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Lim Phin Khian v Kho Su Ming

FEDERAL COURT (KUCHING) — CIVIL APPEAL NO 02-346-1994
EDGAR JOSEPH JR, MOHAMED DZAIDDIN FCJJ AND GOPAL SRI RAM JCA
B 12 DECEMBER 1995

Civil Procedure *— Appeal — Appeal against judgment of High Court — Judgment pronounced on 7 June 1994 — Appellant filed notice of appeal in the then Supreme Court (now Federal Court) on 24 June 1994 — Court of Appeal was created on 24 June 1994 — Whether Federal Court or Court of Appeal had jurisdiction to hear appeal —*
C *Whether s 17 of Courts of Judicature (Amendment) Act 1995 which has retrospective effect rendered Federal Court incompetant to hear present appeal — Courts of Judicature (Amendment) Act 1994 — Courts of Judicature (Amendment) Act 1995 ss 1 & 17*

Civil Procedure *— Appeal — Right of appeal — General principle — Right of appeal existed at date when original action was instituted — But manifest injustice resulted if*
D *general principle applied in present case — Whether general principle was displaced by s 17 of Courts of Judicature (Amendment) Act 1995 — Whether Parliament intended that right of appeal arose when judgment which was appealed against was pronounced — Courts of Judicature (Amendment) Act 1995 s 17*

Civil Procedure *— Appeal — Right of appeal — Presumption that any alteration in*
E *law relating to appeal after institution of original proceedings not to be retrospective — Whether prima facie presumption against retrospectivity displaced by contrary Parliamentary intention — Correct approach to determine Parliament's intention — Courts of Judicature (Amendment) Act 1995 s 17*

Statutory Interpretation *— Construction of statutes — Purposive approach —*
F *Interpretation of s 17 of Courts of Judicature (Amendment) Act 1995 — Whether court disinclined to hold provision imposed obligation if great injustice resulted — Whether marginal note of provision could be used as aid to interpretation — Courts of Judicature (Amendment) Act 1995 s 17*

Statutory Interpretation *— Construction of Statutes — Intention of Parliament —*
G *Whether Parliament is presumed to know all the relevant law on the subject it legislates — Correct approach to determine Parliament's intention — Whether intention could be implied — Whether court should avoid absurd result — Whether court could refer to explanatory statement to Bill presented in Parliament as an aid — Whether court could take into account marginal note and historical background of enactment — Courts of Judicature (Amendment) Act 1995 s 17*

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The judgment under appeal in this case was a judgment of the High Court, pronounced on 7 June 1994. Under r 56 of the then existing Rules of the Supreme Court 1980, the appellant had one month from the date of that decision to bring his appeal to the Supreme Court (now the Federal Court). On 24 June 1994, the appellant filed and
I serve his notice of appeal. Meanwhile, Parliament created the Court of Appeal on 24 June 1994, with the coming into force of the Courts of Judicature (Amendment) Act 1994 ('the Amending Act of 1994'), and vested it with jurisdiction to hear and determine all appeals from

decisions of the High Court after the date of its creation. When this appeal came on for hearing before the Federal Court on 25 September 1995, counsel for the respondent took a preliminary objection as to the competency of the appeal. It was contended that as the notice of appeal in this case was filed on 24 June 1994, the appeal lay not to the Federal Court but to the Court of Appeal, and that the Federal Court had no jurisdiction to entertain this appeal Responding to these submissions, the appellant's counsel argued that the appeal was competent, because the appellant had a substantive right vested in him to approach the Federal Court at the date of the decision by the High Court, and that the Amending Act of 1994 did not operate to deprive the appellant of that right.

Held, dismissing the preliminary objection:

(1) (Per **Edgar Joseph Jr FCJ**) Pursuant to s 17 of the Courts of Judicature (Amendment) Act 1995 ('the Amending Act of 1995'), which is deemed to have come into force on 24 June 1994, any proceeding which is pending before the Supreme Court on the 23 June 1994 shall be continued or proceeded with before the Federal Court. The words 'any proceeding' in s 17 include 'appeal', and such appeal means an appeal from the judgment, order or decision of the High Court (see pp 14C–D and 18H).

(2) (Per **Edgar Joseph Jr FCJ**) The effect of s 17 of the Amending Act of 1995, would appear to be that the material date for determining whether it is the Court of Appeal or the Federal Court which is to have jurisdiction to hear a particular appeal from judgments, orders or decisions of the High Court, is 23 June 1994, so that if on that date there is already an appeal pending in the Supreme Court (now the Federal Court), it shall be that court (now the Federal Court) which shall be invested with the jurisdiction to hear the same (see pp 15D–E).

(3) (Per **Edgar Joseph Jr FCJ**) However, it does not follow that if a suit was instituted before 23 June 1994, the court invested with the jurisdiction to hear the appeal from the High Court is the Court of Appeal in all cases, as this interpretation would lead to a manifest injustice. In this case, for example, the appellant did not had any reason to suppose that his appeal had to lie to the Court of Appeal when he filed his appeal on 24 June 1994. This is because although the Amending Act of 1995 was gazetted on 16 February 1995, so that ordinarily it would have come into operation on 17 February 1995, it is deemed to have come into force on the 24 June 1994 by s 1 of the Amending Act of 1995 (see pp 15H–I and 16A–D).

(4) (Per **Edgar Joseph Jr FCJ**) Where great inconvenience or injustice will follow as a result of requiring strict compliance with a statute, the courts will be disinclined to hold that the provision imposes an obligation even though it may be couched

A in mandatory terms (see p 16E–G); *Simpson v AG* [1955] NZLR 271 and *Clayton v Heffron* (1960) 105 CLR 214 followed.

(5) (Per **Edgar Joseph Jr FCJ**) The marginal note to s 17 of the Amending Act of 1995 states that s 17 is a saving provision. Although under the well-known canon of construction, the
B intention of a saving provision is to narrow the effect of the enactment in which it is found, s 17 is quite the opposite of an ordinary saving clause, for it displaces the general principle enunciated in *Colonial Sugar Refining Co Ltd v Irving* [1905] AC 369 [ie the Macnaghten test] that the right of appeal vests in a litigant at the date of the institution of the suit in the court of
C first instance (see pp 14F–H and 15C); *Colonial Sugar Refining Co Ltd v Irving* [1905] AC 369 not followed.

(6) (Per **Edgar Joseph Jr FCJ**) Since an appeal is a proceeding by which the correctness of the decision of the court below is under challenge before the appellate court, it can be argued
D that Parliament intended by the enactment of s 17 that the right of appeal should arise only when a judgment, order or decision is given. Applying a purposive interpretation to s 17, it is clear that Parliament intended that so long as there is a judgment, order or decision of the High Court, given on or before 23 June 1994, and an appeal against the same has been
E brought whether on or before *or even after* such date, it is the Federal Court and not the Court of Appeal which is invested with the jurisdiction to hear and determine the same (see pp 18I and 19A–C).

Cases referred to

F *Alton Woods* [1600] 1 Co Rep 40 b
Arnold v Gravesend Corp [1856] 2 K & J 574
Asgarali Nazaran Singaporewalla v State of Bombay AIR 1957 SC 502
AG & Ors v Murray (1968) 70 DLR (2d) 52
G *Bushell v Hammond* [1904] 2 KB 563
Butcher v Henderson (1868) LR 3 QB 335
Clayton v Heffron (1960) 105 CLR 214
Colonial Sugar Refining Co Ltd v Irving [1905] AC 369
Dixie v Royal Columbian Hospital (1941) 2 DLR 138
Doran v Jewel 49 SCR 88
H *KC Dora v Annamanaidu* [1974] 1 SCC 567
Lee Chow Meng v PP [1978] 2 MLJ 36
Maxwell v Murphy (1957) 96 CLR 261
PP v Hun Peng Khai & Ors [1984] 2 MLJ 318
Phang Chin Hock v PP (No 2) [1980] 1 MLJ 213
I *Province of New Brunswick v Budovitch* 1 NBR (2d) 661
R v Schildkamp [1971] AC 1; [1969] 3 All ER 1640; [1970] 2 WLR 279
SK Kashyap v State of Rajasthan AIR 1971 SC 1120
Simpson v AG (1955) NZLR 271
Smith v Thiess Peabody Coal Pty Ltd [1965] QWN 38

Teo Cheng Leong v PP [1970] 2 MLJ 275
Yrttiaho v Public Curator (Q) (1971) 125 CLR 228

(7) (Per **Gopal Sri Ram JCA**) The Macnaghten test has been read as establishing the proposition that a right of appeal vests in a litigant at the time of institution of the original proceedings. In other words, the point of time at which it is to be determined whether a right of appeal exists is the date on which the original action was instituted, and not the date on which the notice of appeal is filed and served. It follows that any alteration in the law relating to appeals after institution of original proceedings, is presumed not to be retrospective. This presumption against retrospectivity is based upon the judicial philosophy that Parliament does not intend an unjust result (see p 22D–G); *Colonial Sugar Refining Co Ltd v Irving* [1905] AC 369 and *Pesurohjaya Ibu Kota Kuala Lumpur v Public Trustee & Ors* [1971] 2 MLJ 30 followed.

(8) (Per **Gopal Sri Ram JCA**) In any given case, the task of a court is to examine the particular statute that has fallen for interpretation and to ascertain what Parliament intended. In the present case, the question that falls for determination is whether the prima facie presumption against retrospectivity has been displaced by contrary Parliamentary intention (see p 24B–C).

(9) (Per **Gopal Sri Ram JCA**) If the Macnaghten test is applied to the present case, it would mean that in respect of all proceedings which had been instituted in a High Court before 24 June 1994, appeals would lie directly to the Federal Court and not to the Court of Appeal. The result would be that all orders made upon applications and appeals in respect of matters heard and disposed of by the Court of Appeal since its establishment were made without jurisdiction (see p 25E–F).

(10) (Per **Gopal Sri Ram JCA**)There is an irrebuttable presumption that Parliament is presumed to know all the relevant law upon the particular subject upon which it legislates. While there is no express saving provision in the Amending Act of 1994 displacing the Macnaghten test, there is room for implying a contrary intention out of necessity. This is because the hiatus in the Amending Act of 1994 must have been an oversight for Parliament could not have gone through the elaborate process of creating the Court of Appeal and endowing it with all the appellate powers and jurisdiction only to leave it bereft of any business. The correct approach is to look at the substance and general purpose of the legislation in order to discover its objective (see pp 25G–H and 26C–E); *Chellapah v Malayan Railway Administration* [1948–49] MLJ Supp 173 and '*The Boucraa*' [1994] 1 All ER 20 followed.

(11) (Per **Gopal Sri Ram JCA**) Without being influenced by its contents, the court was satisfied from a reading of the explanatory

A statement to the Bill which was passed as the Amending Act of 1994, that Parliament intended to displace the Macnaghten test to this extent; that the cut-off date of the appellate jurisdiction of the Federal Court in respect of cases decided by a High Court is the date of the decision, and not the date of the institution of the proceedings. In conclusion, in respect of all B decisions of High Court pronounced before 24 June 1994 which is pending, appeals lie to the Federal Court. However, for all decisions pronounced on or after that date, appeals lie to the Court of Appeal (see pp 26E–H and 29B–C); *Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345 followed.

C (12) (Per **Gopal Sri Ram JCA**) At first sight, s 17 of the Amending Act of 1995 appears to postulate the existence of a proceeding pending before the Supreme Court on the 23 June 1994, which shall be continued or proceeded with before the Federal Court. On such a construction, it would follow that if there was no D proceeding pending before the Supreme Court on 23 June 1994, then there would be nothing to be proceeded with before this court. This construction, which has the effect of barring the appellant who delivered his notice of appeal on the 24 June 1994 from appealing is unjust, and thus, has to be rejected (see E p 27C–I).

(13) (Per **Gopal Sri Ram JCA**) Section 17 does nothing to affect the question which has arisen for determination in the instant case. From the marginal note and the history behind the enactment of s 17, it is clear that s 17 is enacted for the limited F purpose of conferring jurisdiction on the Federal Court to hear matters which are pending before the Supreme Court before the date on which the Federal Court was created (see pp 28A–E); *Pepper (Inspector of Taxes) v Hart* [1993] AC 593; [1993] 1 All ER 42; [1992] 3 WLR 1032 followed.

G (14) (Per **Gopal Sri Ram JCA**) The present appeal had been properly brought to the Federal Court This was a case to which the Amending Act of 1994 has no application as the decision by the High Court was delivered before the Amending Act of 1994 came into force. Further, s 17 of the Amending act of 1995 did not render this appeal incompetent (see p 29C–D).

H Cases referred to

AG & Ors v Murray (1968) 70 DLR (2d) 52
'Boucraa', The [1994] 1 All ER 20
Chellapah v Malayan Railway Administration [1948–49] MLJ Supp 173
I *Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345
Colonial Sugar Refining Co Ltd v Irving [1905] AC 369
Commonwealth v Limerick Steamship Co Ltd and Kidman (1924) 35 CLR 69
Doran v Jewell 49 SCR 88
Garikapati v Subbiah Choudhry AIR 1957 SC 540

Hoosein Kasam Dada (India) Ltd v State of Madhya Pradesh AIR 1953 SC 221
Jironc v Quodling (1978) 20 ALR 103
Jose Da Costa v Bascora Narcornim AIR 1975 SC 1843
Kasibai v Mahadu AIR 1965 SC 703
Lee Chow Meng v PP [1978] 2 MLJ 36
Pepper (Inspector of Taxes) v Hart [1993] AC 593; [1993] 1 All ER 42; [1992] 3 WLR 1032
Pesurohjaya Ibu Kota Kuala Lumpur v Public Trustee & Ors [1971] 2 MLJ 30
Phang Chin Hock v PP (No 2) [1980] 1 MLJ 213
Plewa v Chief Adjudication Officer [1994] 3 All ER 323; [1993] 3 WLR 317
Province of New Brunswick v Budovitch 1 NBR (2d) 661
PP v Hun Peng Khai & Ors [1984] 2 MLJ 318
Secretary of State for Social Security v Tunnicliffe [1991] 2 All ER 712
Setali Development Sdn Bhd & Anor v Lim You Keng [1984] 1 MLJ 26
State of Bombay v Supreme General Films Exchange AIR 1960 SC 980
Stephens v Cuckfield Rural District Council [1960] 2 QB 373
Teo Cheng Leong v PP [1970] 2 MLJ 275

Obiter:

(Per **Edgar Joseph Jr FCJ**) Where a separate category of appeals pending in the Federal Court, arising from suits or proceedings which, although instituted in the court of first instance prior to 24 June 1994, had been decided by the High Court on or after that date, the only remedy then open to such appellants would be to promptly apply for an order of extension of time to appeal to the Court of Appeal (see p 19E–H).

[Bahasa Malaysia summary

Penghakiman yang di bawah rayuan dalam kes ini, merupakan suatu penghakiman Mahkamah Tinggi yang telah diumumkan pada 7 Jun 1994. Di bawah k 56 Kaedah-kaedah Mahkamah Agung 1980 yang wujud ketika itu, perayu mempunyai tempoh satu bulan dari tarikh keputusan itu untuk membuat rayuan ke Mahkamah Agung (kini Mahkamah Persekutuan). Pada 24 Jun 1994, perayu telah memfailkan dan menyampaikan notis rayuannya. Sementara itu, Parlimen telah mewujudkan Mahkamah Rayuan pada 24 Jun 1994, dengan berkuatkuasanya Akta Mahkamah Kehakiman (Pindaan) 1994 ('Akta Pindaan 1994'), dan telah meletakkan bidangkuasa ke atasnya untuk mendengar dan menentukan kesemua rayuan daripada keputusan Mahkamah Tinggi selepas tarikh pewujudannya. Apabila rayuan ini dibicarakan di Mahkamah Persekutuan pada 25 September 1995,

peguam penentang telah membuat suatu bantahan permulaan mengenai kompetens rayuan ini. Adalah dihujahkan bahawa oleh kerana notis rayuan dalam kes ini telah difailkan pada 24 Jun 1994, rayuan sepatutnya tidak boleh dibuat kepada Mahkamah Persekutuan, tetapi kepada Mahkamah Rayuan, dan bahawa Mahkamah Persekutuan tidak mempunyai bidang kuasa untuk membicarakan rayuan ini. Sebagai balasan terhadap penghujahan tersebut, peguam perayu menyatakan bahawa rayuan tersebut adalah kompeten, kerana perayu mempunyai suatu hak substantif yang telah diletakkan ke atasnya untuk merayu kepada Mahkamah Persekutuan pada tarikh keputusan Mahkamah Tinggi, dan Akta Pindaan 1994 tidak menjejaskan hak perayu tersebut.

Diputuskan, menolak bantahan permulaan:

(1) (Oleh **Edgar Joseph Jr HMP**) Mengikut s 17 Akta Mahkamah Kehakiman (Pindaan) 1995 ('Akta Pindaan 1995'), yang telah disifatkan sebagai berkuatkuasa pada 24 Jun 1994, sebarang prosiding yang belum selesai di Mahkamah Agung pada 23 Jun 1994 akan disambung atau dijalankan di Mahkamah Persekutuan. Perkataan 'sebarang prosiding' dalam s 17 merangkumi 'rayuan', dan rayuan sedemikian bermakna rayuan daripada penghakiman, perintah atau keputusan Mahkamah Tinggi (lihat ms 14C–D dan 18H).

(2) (Oleh **Edgar Joseph Jr HMP**) Sekyen 17 Akta Pindaan 1995 nampaknya membawa kesan bahawa tarikh material untuk menentukan sama ada Mahkamah Rayuan ataupun Mahkamah Persekutuan yang mempunyai bidang kuasa untuk membicarakan sesuatu rayuan daripada penghakiman, perintah atau keputusan Mahkamah Tinggi, ialah 23 Jun 1994, supaya jika sudah terdapat suatu rayuan yang belum selesai di Mahkamah Agung (kini Mahkamah Persekutuan) pada tarikh tersebut, mahkamah tersebutlah (kini Mahkamah Persekutuan) yang akan diletakkan dengan bidang kuasa untuk membicarakan rayuan tersebut (lihat ms 15D–E).

(3) (Oleh **Edgar Joseph Jr HMP**) Walau bagaimanapun, ini tidak bermakna bahawa jika suatu guaman dimulakan sebelum 23 Jun 1994, maka mahkamah yang diletakkan dengan bidang kuasa untuk membicarakan rayuan daripada Mahkamah Tinggi merupakan Mahkamah Rayuan dalam kesemua kes, kerana tafsiran ini akan menyebakan ketidakadilan yang nyata. Dalam kes ini, sebagai contoh, perayu tidak mempunyai sebarang sebab untuk menganggap rayuannya harus dibuat kepada Mahkamah Rayuan apabila dia memfailkan rayuannya pada 24 Jun 1994. Ini adalah kerana walaupun Akta Pindaan 1995 telah diwartakan pada 16 Februari 1995, dan dalam keadaan biasa ia akan berkuatkuasa pada 16 Februari 1995, tetapi ia telah disifatkan

sebagai berkuatkuasa pada 24 Jun 1994 di bawah s 1 Akta Pindaan 1995 (lihat ms 15H–I dan 16A–D). A

(4) (Oleh **Edgar Joseph Jr HMP**) Jika kesulitan atau ketidakadilan yang besar merupakan akibat pematuhan sesuatu statut secara ketat, mahkamah adalah tidak cenderung untuk memutuskan bahawa peruntukan tersebut telah meletakkan suatu kewajipan walaupun ia mungkin diungkapkan dalam terma mandatori (lihat ms 16E–G); *Simpson v AG* [1955] NZLR 271 and *Clayton v Heffron* (1960) 105 CLR 214 diikut. B

(5) (Oleh **Edgar Joseph Jr HMP**) Nota birai kepada s 17 Akta Pindaan 1995 menyatakan bahawa s 17 merupakan suatu peruntukan penyelamat. Walaupun di bawah hukum pentafsiran yang mantap, tujuan suatu peruntukan penyelamat ialah untuk menyempitkan kesan suatu enakmen di mana ia dijumpai, s 17 mempunyai kesan yang bertentangan dengan suatu peruntukan penyelamat yang biasa, kerana ia menyesarkan prinsip am yang dinyatakan dalam *Colonial Sugar Refining Co Ltd v Irving* [1905] AC 369 [iaitu ujian Macnaghten] bahawa hak rayuan dletakkan dalam seseorang litigan pada tarikh permulaan guaman dalam mahkamah pertamanya (lihat ms 14F–H dan 15C); *Colonial Sugar Refining Co Ltd v Irving* [1905] AC 369 tidak diikut. C D

(6) (Oleh **Edgar Joseph Jr HMP**) Oleh kerana rayuan merupakan suatu prosiding di mana kebetulan keputusan mahkamah yang lebih rendah dicabar, maka, boleh dihujahkan bahawa Parlimen berniat melalui enakmen s 17 bahawa hak rayuan bangkit apabila suatu penghakiman, perintah atau keputusan diberikan. Dengan menggunakan suatu pentafsiran purposif, adalah jelas bahawa Parlimen berniat bahawa jika suatu penghakiman, perintah atau keputusan Mahkamah Tinggi diberikan pada atau sebelum 23 Jun 1994, dan suatu rayuan terhadapnya telah dibuat sama ada pada, sebelum, mahupun selepas tarikh itu, Mahkamah Persekutuanlah dan bukannya Mahkamah Rayuan yang telah diberikan bidang kuasa untuk membicarakan (lihat ms 18I dan 19A–C). E F G

(7) (Oleh **Gopal Sri Ram HMR**) Ujian Macnaghten telah dianggap sebagai telah memantapkan kenyataan bahawa sesuatu hak rayuan diletakkan pada seorang litigan pada masa permulaan prosiding asal. Dalam perkataan lain, masa yang sepatutnya digunakan untuk menentukan sama ada suatu hak rayuan wujud ialah tarikh tindakan asal dimulakan, dan bukan tarikh notis rayuan difail dan disampaikan. Maka, sebarang perubahan dalam undang-undang mengenai rayuan selepas permulaan prosiding asal, adalah disifatkan sebagai tidak kebelakangan. Anggapan yang menentang kebelakangan ini adalah berdasarkan falsalfah kehakiman bahawa Parlimen tidak berniat untuk menghasilkan keputusan yang tidak adil (lihat ms 22D–G); *Colonial Sugar Refining Co Ltd v Irving* [1905] AC 369 dan *Pesurohjaya Ibu Kota Kuala Lumpur v Public Trustee & Ors* [1971] 2 MLJ 30 diikut. H I

(8) (Oleh **Gopal Sri Ram HMR**) Dalam sebarang kes, tugas mahkamah ialah untuk mengkaji statut yang harus ditafsirkan itu dan menentukan apa yang diniatkan oleh Parlimen. Dalam kes ini, soalan yang harus dipertimbangkan ialah sama ada anggapan prima facie yang menentang kebelakangan telahpun disesarkan oleh niat Parlimen yang bertentangan (lihat ms 24B–C).

(9) (Oleh **Gopal Sri Ram HMR**) Jika ujian Macnaghten terpakai dalam kes ini, ini akan bermakna bahawa rayuan terhadap kesemua prosiding yang telah dimulakan di Mahkamah Tinggi sebelum 24 Jun 1994 adalah kepada Mahkamah Persekutuan secara langsung, dan bukannya kepada Mahkamah Rayuan. Hasilnya ialah kesemua perintah yang dibuat atas permohonan dan rayuan ekoran daripada apa yang telah dibicarakan dah diselesaikan oleh Mahkamah Rayuan sejak penubuhannya adalah dibuat tanpa bidang kuasa (lihat ms 25E–F).

(10) (Oleh **Gopal Sri Ram HMR**) Adalah merupakan suatu anggapan yang tidak dapat dipatahkan bahawa Parlimen adalah dianggap sebagai mengetahui kesemua undang-undang yang relevan mengenai sesuatu subjek yang ia gubal. Walaupun tidak ada peruntukkan penyelamat yang nyata dalam Akta Pindaan 1994 yang menyesarkan ujian Macnaghten, suatu niat yang bertentangan boleh dibayangkan atas sebab keperluan. Kerumpangan dalam Akta Pindaan 1994 semestinya suatu kesilapan kerana Parlimen tidak mungkin, setelah melalui proses yang rumit untuk menubuhkan Mahkamah Rayuan dan meletakkan padanya segala kuasa dan bidang kuasa rayuan, meninggalkannya tanpa apa-apa urusan. Pendekatan yang betul ialah dengan melihat kandungan dan tujuan am undang-undang yang terlibat untuk menentukan objektifnya (lihat ms 25G–H, 26 C–F); *Chellapah v Malayan Railway Administration* [1948–49] MLJ Supp 173 dan '*The Boucraa*' [1994] 1 All ER 20 diikut.

(11) (Oleh **Gopal Sri Ram HMR**) Tanpa dipengaruhi oleh kandungannya, mahkamah adalah berpuas hati daripada pembacaan kenyataan penerangan kepada rang undang-undang Akta Pindaan 1994 bahawa Parlimen berniat menyesarkan ujian Macnaghten setakat ini; iaitu tarikh pemenggalan bidang kuasa rayuan mahkamah ini terhadap kes yang diputuskan oleh Mahkamah Tinggi merupakan tarikh keputusan dan bukan tarikh permulaan prosiding. Sebagai kesimpulannya, untuk semua keputusan Mahkamah Tinggi yang diumumkan sebelum 24 Jun 1994 yang belum selesai, rayuan harus dibicarakan di Mahkamah Persekutuan. Walau bagaimanapun, bagi keputusan yang diumumkan pada atau selepas tarikh tersebut, rayuan harus dibicarakan di Mahkamah Rayuan (lihat ms 26E–H and 29B–C); *Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345 diikut.

(12) (Oleh **Gopal Sri Ram HMR**) Sepintas lalu, s 17 Akta Pindaan 1995 nampaknya mempostulatkan kewujudan prosiding yang belum selesai di Mahkamah Agung pada 23 Jun 1994, yang harus diteruskan atau dijalankan di Mahkamah Persekutuan. Walau bagaimanapun, tafsiran sedemikian, yang berkesan menyekat perayu yang telah memfailkan rayuannya pada 24 Jun 1994 untuk membuat rayuan, adalah tidak adil, dan harus ditolak (lihat ms 27C–I).

(13) (Oleh **Gopal Sri Ram HMR**) Seksyen 17 tidak mempengaruhi soalan yang harus dipertimbangkan dalam kes ini. Daripada nota birai dan sejarah di sebalik enakmen s 17, adalah jelas s 17 digubal untul tujuan terhad, iaitu untuk memberikan bidang kuasa kepada Mahkamah Persekutuan untuk terus membicarakan perkara yang belum selesai di Mahkamah Agung sebelum tarikh Mahkamah Persekutuan ditubuhkan (lihat ms 28A–E); *Pepper (Inspector of Taxes) v Hart* [1993] AC 593; [1993] 1 All ER 42; [1992] 3 WLR 1032 diikut.

(14) (Oleh **Gopal Sri Ram HMR**) Rayuan ini telah dibawa kepada Mahkamah Persekutuan dengan betul. Ini merupakan suatu kes di mana Akta Pindaan 1994 tidak terpakai, kerana keputusan Mahkamah Tinggi telah diumumkan sebelum Akta Pindaan 1994 berkuatkuasa. Lagipun, s 17 Akta Pindaan 1995 tidak menyebabkan rayuan ini tidak kompeten. (lihat ms 29C–D).

Obiter:

(Oleh **Edgar Joseph Jr FCJ**) Jika terdapat suatu kategori rayuan yang berasingan yang belum selesai di Mahkamah Persekutuan, yang terbit daripada guaman atau prosiding yang, walaupun dimulakan di mahkamah pertama kali sebelum 24 Jun 1994, telah diputuskan oleh Mahkamah Tinggi pada atau selepas tarikh itu, remedi tunggal yang terbuka kepada perayu sedemikian adalah dengan cepatnya memohon untuk suatu perintah untuk melanjutkan masa untuk merayu kepada Mahkamah Rayuan (lihat ms 19E–H).]

Notes

For cases on appeals, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 259–699.

For cases on construction of statutes, see 11 *Mallal's Digest* (4th Ed) paras 1308–1368; [1992] Mallal's Digest 1613–1624; [1993] Mallal's Digest 1250–1257; [1994] Mallal's Digest 2055–2074.

Complete list of cases referred to

Alton Woods [1600] 1 Co Rep 40 b
Arnold v Gravesend Corp [1856] 2 K & J 574
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AG & Ors v Murray (1968) 70 DLR (2d) 52
'Boucraa', The [1994] 1 All ER 20
Bushell v Hammond [1904] 2 KB 563

A *Butcher v Henderson* (1868) LR 3 QB 335
Chellapah v Malayan Railway Administration [1948–49] MLJ Supp 173
Chor Phaik Har v Farlim Properties Sdn Bhd [1994] 3 MLJ 345
Clayton v Heffron (1960) 105 CLR 214
B *Colonial Sugar Refining Co Ltd v Irving* [1905] AC 369
Commonwealth v Limerick Steamship Co Ltd and Kidman (1924) 35 CLR 69
Dixie v Royal Columbian Hospital (1941) 2 DLR 138
Doran v Jewell 49 SCR 88
Garikapati v Subbiah Choudhry AIR 1957 SC 540
C *Hoosein Kasam Dada (India) Ltd v State of Madhya Pradesh* AIR 1953 SC 221
Jironc v Quodling (1978) 20 ALR 103
Jose Da Costa v Bascora Narcornim AIR 1975 SC 1843
KC Dora v Annamanaidu [1974] 1 SCC 567
Kasibai v Mahadu AIR 1965 SC 703
D *Lee Chow Meng v PP* [1978] 2 MLJ 36
Maxwell v Murphy (1957) 96 CLR 261
PP v Hun Peng Khai & Ors [1984] 2 MLJ 318
Pepper (Inspector of Taxes) v Hart [1993] AC 593; [1993] 1 All ER 42; [1992] 3 WLR 1032
E *Pesurohjaya Ibu Kota Kuala Lumpur v Public Trustee & Ors* [1971] 2 MLJ 30
Phang Chin Hock v PP (No 2) [1980] 1 MLJ 213
Plewa v Chief Adjudication Officer [1994] 3 All ER 323; [1993] 3 WLR 317
Province of New Brunswick v Budovitch 1 NBR (2d) 661
F *R v Schildkamp* [1971] AC 1; [1969] 3 All ER 1640; [1970] 2 WLR 279
SK Kashyap v State of Rajasthan AIR 1971 SC 1120
Secretary of State for Social Security v Tunnicliffe [1991] 2 All ER 712
Setali Development Sdn Bhd & Anor v Lim You Keng [1984] 1 MLJ 26
G *Simpson v A-G* [1955] NZLR 271
Smith v Thiess Peabody Coal Pty Ltd (1965) QWN 38
State of Bombay v Supreme General Films Exchange AIR 1960 SC 980
Stephens v Cuckfield Rural District Council [1960] 2 QB 373
Teo Cheng Leong v PP [1970] 2 MLJ 275
Yrttiaho v Public Curator (Q) (1971) 125 CLR 228
H

Legislation referred to

Courts of Judicature (Amendment) Act 1994 s 16
Courts of Judicature (Amendment) Act 1995 ss 1, 17
Interpretation Acts 1948 and 1967 (Consolidated and Revised 1989)
I ss 18, 30(1)(b), (d), (e)
Federal Constitution
Rules of the Supreme Court 1980 r 54
Commonwealth Judiciary Act 1903 s 39 [Aust]
Interpretation Acts 1954 to 1962 s 20(1)(e) [Aust]

Appeal from: Originating Summons No KG320 of 1993/II (High Court, Kuching) A

Perpetua Phang (*Reddi & Co*) for the appellant.
Lina Wee (*Charles Ling*) for the respondent.

Cur Adv Vult B

Edgar Joseph Jr FCJ (delivering the judgment of the court): When this appeal was called on for hearing, counsel for the respondent had raised a preliminary objection as to the competency of the appeal. It was contended that this appeal did *not* lie to the Federal Court, *but* to the Court of Appeal. C

More particularly, it was the contention of counsel for the respondent, that the judgment under appeal was a judgment of the High Court pronounced on 7 June 1994, in respect of an Originating Summons No 320–93/11, issued on 7 June 1994, notice of appeal, having been filed and served on 24 June 1994, and so, the material date for purposes of determining the challenge to jurisdiction was the date of filing the notice of appeal, which, incidentally was also the date of the creation of the Court of Appeal, and so the appeal lay not to the Federal Court but to the Court of Appeal and vested in the latter court. D

I think that it would not be an unfair summary of the argument advanced by counsel for the respondent in support of the preliminary objection to say that its effect was this: although the decision of the High Court was delivered on 7 June 1994, so that by reason of r 54 of the then applicable Rules of the Supreme Court 1980, the appellant had one month from that date to bring his appeal to the Supreme Court, he had in fact done so on 24 June 1994, which, as it happened, was the very day on which Parliament had, by the Courts of Judicature (Amendment) Act 1994 (Act A886) ('the Amending Act of 1994'), which had come into operation, not merely renamed our apex court, the Supreme Court, as the Federal Court, but had also created the Court of Appeal — an intermediate Court of Appeal. E F G

It was accordingly contended that the court invested with the jurisdiction to hear and determine this appeal was, not this court, but the Court of Appeal, with the result that this appeal was incompetent and would have to be dismissed in limine.

In answer to the preliminary objection, counsel for the appellant contended that the right of appeal is a matter of substance and not a mere matter of practice and procedure, and that such a right accrues to the litigant and vests in him as from the date of commencement of the action or lis, and although it may be actually exercised when the judgment appealed against is pronounced, such right is to be determined having regard to the law applicable at the date of the institution of the action or lis and not by the law applicable at the date of the decision or the date of filing of the appeal. It was further submitted that this vested right of appeal could only be taken away or transferred to a new tribunal by subsequent H I

A legislation if it so provides expressly or by necessary intendment but not otherwise.

In support, a number of cases were cited, including the leading Australian Privy Council case of *Colonial Sugar Refining Co Ltd v Irving* [1905] AC 369, which has been applied locally (see eg *Teo Cheng Leong v PP* [1970] 2 MLJ 275; *Lee Chow Meng v PP* [1978] 2 MLJ 36; *Phang Chin Hock v PP (No 2)* [1980] 1 MLJ 213; *PP v Hun Peng Khai & Ors* [1984] 2 MLJ 318), in India, by the Indian Supreme Court (see eg *KC Dora v Annamanaidu* [1974] 1 SCC 567), and in Canada (see eg *Doran v Jewel* 49 SCR 88 and *AG & Ors v Murray* (1968) 70 DLR (2d) 52; *Province of New Brunswick v Budovitch* 1 NBR (2d) 661).

C In the *Colonial Sugar Refining Co* case, an application had been made by the respondent that the appeal from the judgment of the Supreme Court of Queensland be dismissed on the ground that the right of appeal to His Majesty in Council given by the order in council dated 30 June 1860, under which the leave was granted, had been taken away by s 39 of D the Australian Commonwealth Judiciary Act 1903, and that the only appeal from a decision of the Supreme Court of Queensland thereafter lay to the High Court of Australia.

The writ in the action in which the appeal was brought had been issued on 25 October 1902. The case was set down for argument in July E 1903, but it was stood over to the September sitting of the court. In the meanwhile, the Australian Commonwealth Judiciary Act 1903, had come into force, it having received the royal assent on 25 August 1903. On 4 September 1903, the court delivered the judgment appealed from. Thereafter, leave to appeal, pursuant to the order in council dated 30 June 1860, was given by the Supreme Court of Queensland. In dismissing the F repondent's objection as to the competency of the appeal, Lord Macnaghten speaking for their Lordships of the Board said this:

> As regards the general principles applicable to the case, there was no controversy. On the one hand, it was not disputed that if the matter in question be a matter of procedure only, the petition is well-founded. On the G other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, it was conceded that, in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the appellants would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendment. And, therefore, the only question is, was the appeal to His Majesty in Council a H right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the I appeal to a new tribunal. In either case, there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested.

If I were free to decide the preliminary objection on general principle, I would unhesitatingly hold that the principles enunciated in the *Colonial Sugar Refining Co* case would apply — although the effect of doing so would mean that many decisions of the Court of Appeal in appeals arising from suits or proceedings instituted in the court of first instance prior to 24 June 1994, would thereby be nullified, and the Court of Appeal would be bereft of business for a while — and, on that ground alone, the preliminary objection would have to be overruled.

However, the problem which faces the appellant is that by s 17 of the Courts of Judicature (Amendment) Act 1995 (Act A909) ('the Amending Act of 1995') (which was overlooked all round) it is provided as follows:

> Any *proceeding* which is *pending* before the Supreme Court *on the 23rd June 1994* shall be *continued* or *proceeded with*, as the case may be, before *the Federal Court* and for this purpose the Federal Court shall have and exercise all the powers of the Supreme Court prior to the 24th June 1994. (Emphasis added.)

I hasten to add that although the Amending Act of 1995 came into force on 17 February 1995, it was given retrospective effect by s 1 thereof, which provides that it 'shall be deemed to have come into force on 24th June 1994', — a point of considerable significance in the context of the present case and to which I shall return later.

I must now direct further attention to s 17 of the Amending Act of 1995.

The marginal note to s 17 of the Amending Act of 1995 says that it is a saving provision. In *Bushell v Hammond* [1904] 2 KB 563, Collins MR suggested the approach to marginal notes when he said that a marginal note, while forming no part of the section, was of some assistance as it showed the drift of the section. Similarly, in *R v Schildkamp* [1971] AC 1; [1969] 3 All ER 1640; [1970] 2 WLR 279, Lords Reid and Upjohn were of the view that a marginal or side note will rarely be of any use in interpreting an Act but that they should not be rejected completely as aids. Lord Reid put this on the basis that it is the whole Act that is the product of the legislature and that therefore the whole Act can be looked at if any doubt should arise as to its meaning.

It is a well known canon of construction that the intention of a saving provision is to narrow the effect of the enactment in which it is found so as to preserve some existing legal rule or right, as the case may be, from its operation. It, therefore, differs from a proviso which is generally concerned with limiting the new provision made by the section to which it is attached. The cases of *Alton Woods* [1600] 1 Co Rep 40 b; *Arnold v Gravesend Corp* [1856] 2 K & J 574 at p 591; *Butcher v Henderson* (1868) LR 3 QB 335, show that a saving is taken not to be intended to confer any right which did not exist already.

The next thing to note are the words 'any proceeding which is pending' occurring in s 17 of the Amending Act of 1995. According to 4 *Stroud's Judicial Dictionary* (4th Ed) at p 1890, a legal proceeding is 'pending' as soon as commenced (on which see 5 Rep 47 at p 48; 7 Rep 30), and until it is concluded, ie so long as the court having original

A cognizance of it can make an order on the matters in issue, or is to be dealt with, therein. The same approach was adopted by the Supreme Court of India when considering the question what is a pending legal proceeding (see *Asgarali Nazaran Singaporewalla v State of Bombay* AIR 1957 SC 502 at pp 503 and 509). And, in *SK Kashyap v State of Rajasthan* AIR 1971 SC 1120, it was held that the answer to the question, 'what is a pending B matter?' is: until the case is concluded it is pending.

I agree with the views expressed in the authorities cited on the principles of interpretation applicable to 'savings' and the meaning of the expression 'pending proceedings'.

C However, I consider that the provisions of s 17 of the Amending Act of 1995 are quite the opposite of an ordinary saving clause for it displaces the general principle enunciated in the *Colonial Sugar Refining Co* case that the right of appeal vests in a litigant at the date of the institution of the suit or proceeding in the court of first instance.

D More particularly, the effect of s 17 of the Amending Act of 1995, would appear to be that the material date for determining whether it is the Court of Appeal or the Federal Court which is to have jurisdiction to hear and determine a particular appeal from judgments, orders or decisions of the High Court, is 23 June 1994 — the eve of the date of the creation of the Court of Appeal — so that if on that date there is already an appeal E pending in the Supreme Court (now the Federal Court) it shall be that court (now the Federal Court) which shall be invested with the jurisdiction to hear and determine the same. But, if on that date — 23 June 1994 — a particular appeal was *not* pending in the Supreme Court, then does it follow that, notwithstanding the fact that the suit or proceeding which led up to the appeal was instituted before that date, in *all* such cases the court F invested with the jurisdiction to hear the appeal from a judgment, order or decision of the High Court is the Court of Appeal and *not* the Federal Court?

If that be the true effect of s 17 of the Amending Act of 1995, then having regard to the chronology of events relevant to the preliminary G objection hereinbefore stated, as there was no appeal pending in the Supreme Court as on 23 June 1994, the eve of the date of the creation of the Court of Appeal — I would have no option but to uphold the preliminary objection and strike out the appeal as being incompetent. But, reflection reveals that there are difficulties in the way of accepting this view as a solution to the problem.

H It is pertinent to point out that the Amending Act of 1995 had received the royal assent on 7 February 1995, and was published in the *Gazette* on 16 February 1995, so that ordinarily it would have come into operation on 17 February 1995, (see s 19(2) of the Interpretation Acts 1948 and 1967 (Consolidated and Revised 1989) ('the Interpretation I Act').

However, as I have said, by s 1 of the Amending Act of 1995, it is provided that the amendments made by it 'shall be deemed to have come into force on the 24th June of 1994'.

Clearly, therefore, the Amending Act of 1995 has retrospective effect.

Be that as it may, when the solicitors for the appellant filed and served their notice of appeal on 24 June 1994, and thereby asserted their client's right of appeal, they, not being gifted with prescience, could not possibly have foreseen that some eight months later they would be confronted by the jurisdictional objection hereinbefore mentioned. In other words, when on 24 June 1994, the solicitors for the appellant brought their appeal to the Federal Court, they had not the slightest reason to suppose that their appeal had to lie to the Court of Appeal, for the very good reason that on that date, the provisions of s 17 of the Amending Act of 1995 were unknown to the law and so they had no option but to rely on the general principles of the common law, reinforced by s 30(1)(d) and (e) of the Interpretation Act, as illustrated by the *Colonial Sugar Refining Co* case, and to file their appeal to the Federal Court.

In these circumstances, to uphold the preliminary objection would lead to a manifest injustice and would serve no purpose, so that, if at all possible, this court should be astute to avoid such a result unless, of course, this is what the Amending Act of 1995 plainly requires, in which case, the function of the court is to give effect to the will of Parliament as expressed in the law.

It is not difficult to cite an anthology of cases for the proposition that where great inconvenience or injustice will follow as a result of requiring strict compliance with a statute, the courts will be disinclined to hold that the provision imposes an obligation even though it may be couched in mandatory terms. In *Simpson v AG* [1955] NZLR 271, for example, the provisions of the New Zealand Constitution pertaining to the dissolution of Parliament, which were couched in mandatory terms, were said not to have been complied with. This contention, if upheld, would have nullified a large number of Acts of Parliament. The court held that notwithstanding the fact that the relevant provisions in the Constitution used the word 'shall', the provisions were directory only. In so holding, the court was swayed by the consideration that to hold that the provision was mandatory would have caused chaos and extraordinary inconvenience and would have served no useful purpose. *Clayton v Heffron* (1960) 105 CLR 214 is an Australian case which illustrates the same point.

It seems to me that *the key* to the solution of this problem is the correct answer to the question of critical substance: *whether* the legislature intended that the express provision which *s 17 of the Amending Act of 1995* makes with respect to pending proceedings in the Supreme Court as at 23 June 1994, must be read *as exhaustive so that there is no room for holding* that those appeals even though *not* pending in the Supreme Court on 23 June 1994, *but* against the *judgments, orders or decisions* of the High Court given *on or before that date*, would *also* be within its terms and must, therefore, *also* be heard and determined *by the Federal Court*?

To assist in the determination of the question of critical substance, it will be useful by way of background, to take a hard look at the common law rules regulating the interpretation of amending statutes. I find that

these have been admirably enunciated by Dixon CJ in *Maxwell v Murphy* (1957) 96 CLR 261 at p 267:

> The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events. But, given rights and liabilities fixed by reference to past facts, matters or events, the law appointing or regulating the manner in which they are to be enforced or their enjoyment is to be secured by judicial remedy is not within the application of such a presumption. Changes made in practice and procedure are applied to proceedings to enforce rights and liabilities, or for that matter to vindicate an immunity or privilege, notwithstanding that before the change in the law was made the accrual or establishment of the rights, liabilities, immunity or privilege was complete and rested on events or transactions that were otherwise past and closed. The basis of the distinction was stated by Hellish LJ in *Republic of Costa Rica v Erlanger* (1876) 3 Ch D 62 at p 69. 'No suitor has any vested interest in the course of procedure, nor any right to complain, if during the litigation the procedure is changed, provided, of course, that no injustice is done'.

The learned Chief Justice went on to say at p 270 that perhaps there could be no more practical summary of the principle which emerges from the cases than the following statement by a Canadian judge (Sloan JA) in *Dixie v Royal Columbian Hospital* (1941) 2 DLR 138 at pp 139 and p 140:

> ... unless the language used plainly manifests in express terms or by clear implication a contrary intention —
>
> (a) a statute divesting vested rights is to be construed as prospective;
>
> (b) a statute, merely procedural, is to be construed as retrospective; and
>
> (c) a statute which, while procedural in its character, affects vested rights adversely is to be construed as prospective.

The general rules of the common law aforesaid have been reinforced by s 30(1)(b) and (d) of the Interpretation Act, which, omitting immaterial parts, provides that, 'The repeal of a written law in whole or in part shall not ... (b) affect any right ... accrued ... under the repealed law; ... (d) affect any ... legal proceeding or remedy in respect of any such right ...', unless, as qualified in its application by s 2(3), there is 'express provision to the contrary' or 'something in the subject or context inconsistent with or repugnant to its application'.

In *Smith v Thiess Peabody Coal Pty Ltd* [1965] QWN 38 at p 47, Gibb J (later CJ) dealing with s 20(1)(e) of the Interpretation Acts 1954 to 1962 (Q) (equivalent to s 30(1)(d) of our Interpretation Act), said this:

> that all para (e) is intended to do is to preserve the availability of investigations, legal proceedings and remedies in respect of accrued rights, and not to preserve the procedure to be followed in the course of such legal proceedings.

And, in *Yrttiaho v Public Curator (Q)* (1971) 125 CLR 228 at p 245, the same learned judge dealing with the same statutory provision said this:

> Plainly enough, para (e) and the words which follows it require that, unless the contrary intention appears, an amending enactment shall be construed so that, notwithstanding the amendment, proceedings pending thereunder at the time of the amendment can be continued, *and proceedings can be initiated after the amendment in respect of substantive rights acquired before the amendment took effect.* (Emphasis added.)

Turning to the Amending Act of 1994 which created the Court of Appeal, I note that it contained no transitional provisions with regard to proceedings pending before the Supreme Court on 23 June 1994. In other words, it left untouched the general rules of the common law of which s 30(1)(b) and (d) of the Interpretation Act is the statutory emanation and the effect of which is, as Gibb J said in *Yrttiaho v Public Curator (Q)*, 'that unless the contrary intention appears an amending Act shall be construed so that notwithstanding the amendment ... *proceedings can be initiated after the amendment in respect of substantive rights acquired before the amendment took effect*'. (Emphasis added.) This point is strikingly illustrated by the *Colonial Sugar Refining Co* case where the question which confronted the court was identical to that which now confronts this court.

Not surprisingly, therefore, s 17 of the Amending Act of 1995 was enacted to repair the omission in the Amending Act of 1994 to provide for proceedings pending in the Supreme Court. In the rush of events to do so, Parliament may have overlooked the general rules of the common law hereinbefore referred to.

Be that as it may, it is clear beyond a peradventure that the effect of s 17 of the Amending Act of 1995, on the question to which court an appeal lies from judgments, orders or decisions of the High Court in civil matters, is to displace the general rules of the common law, reinforced by s 30(1)(b) and (d) of the Interpretation Act, as explained in *Yrttiaho v Public Curator (Q)* and illustrated by the *Colonial Sugar Refining Co* case, for it makes the material date for purposes of deciding the jurisdictional question posed, not the date of commencement of the action or proceeding in the court of first instance, but 23 June 1994, that is to say, the eve of the creation of the Court of Appeal, and it goes on to provide that if, as at that date, there is a pending proceeding in the Supreme Court, then such proceeding shall be continued or proceeded with before the Federal Court (formerly the Supreme Court).

It is obvious, therefore, that the words 'any proceeding' in s 17 must include 'appeal' and such appeal must be an appeal from the judgment, order or decision of the High Court.

What then is the true effect of s 17 in the context of the issue which arises for decision?

Now, in principle, it is the correctness of the judgment, order or decision, which is challenged on appeal. It can, therefore, be plausibly argued that since an appeal is a proceeding by which the correctness of the decision of the court below is under challenge before the appellate court, Parliament intended by the enactment of s 17 that the right of appeal should arise, by its very nature, only when a judgment, order or decision by which a litigant is aggrieved is given.

A Accordingly, applying a purposive interpretation to s 17, it is my view that Parliament intended that so long as there is a judgment, order or decision of the High Court, given on or before 23 June 1994, and an appeal against the same has been brought whether on or before *or even after* such date, it is the Federal Court and not the Court of Appeal which is B invested with the jurisdiction to hear and determine the same. This interpretation has the great merit of being simple, clear and uniform and should — subject to one qualification which I shall deal with in the final paragraph of this judgment — certainly avoid the sort of manifest injustice to litigants in the position of the present appellant to which I have referred and discussed. It is, therefore, the interepretation which I would adopt.

C My answer to the question of critical substance, hereinbefore mentioned is, therefore, in the negative, that is to say, in favour of the appellant.

I confess I have arrived at the above conclusion with great hesitation.

In the result, I would overrule the preliminary objection and direct a D hearing of the appeal on the merits. Costs of the preliminary objection to the appellant, in any event.

By way of postscript, a final point needs to be made. The further question arises: what of a separate category of appeals pending in the Federal Court, arising from suits or proceedings which, although instituted E in the court of first instance prior to 24 June 1994, had been decided by the High Court *on or after* that date? In at least *some* of such cases, at the time when such appeals were brought, neither such appellants nor their solicitors, would have had any reason to suppose that their appeals had to lie to the Court of Appeal, for the very good reason that at the time their F appeals were brought to the Federal Court, the provisions of s 17 of the Amending Act of 1995 were unknown to the law. In such circumstances, such appellants, just as much as the present appellant, would have had no option but to rely on the general rules of the common law reinforced by s 30(1)(d) and (e) of the Interpretation Act, illustrated by the *Colonial Sugar Refining Co* case, and to bring their appeals to the Federal Court. In G this situation, to uphold a preliminary objection as to the competency of this category of appeals to the Federal Court would, like the present case, lead to a manifest injustice. Yet, on my interpretation s 17 of the Amending Act of 1995, this court would have no alternative but to do so and to strike out the appeals as being incompetent. I venture to suggest that the only remedy then open to such appellants would be to promptly apply for an H order of extension of time to appeal to the Court of Appeal. In which event, given due diligence on the part of such appellants and their solicitors, I can think of no good reason why such an application should not be granted, as to refuse it, would be tantamount to perpetuating a manifest injustice.

I

Gopal Sri Ram JCA: When this appeal came on for hearing before us on 25 September 1995, Cik Lina Wee of counsel for the respondent, after having given advance notice of it to her opponent, took a preliminary objection as to the competency of the appeal. Her argument, although

unsupported by any relevant authority, was neatly presented. It may be summarized as follows.

The decision in this case was delivered by the High Court on 7 June 1994. The instant appellant had, under the provisions of r 56 of the then existing Rules of the Supreme Court 1980, one month from the date of that decision to bring its appeal. Parliament by amendments made to the Federal Constitution and the Courts of Judicature Act 1964 ('the Act') created the Court of Appeal and vested it with jurisdiction to hear and determine all appeals from decisions of the High Court after the date of its creation. These amendments were published in the *Gazette* on 23 June 1994. By reason of s 18 of the Interpretation Acts 1948 and 1967 (Consolidated and Revised 1989) ('the Interpretation Act'), they came into force on 24 June 1994. The notice of appeal in the present case was filed and served on 24 June 1994, that is to say, the very day on which the Court of Appeal was established. Consequently, this appeal should have been brought before the Court of Appeal which is the court having jurisdiction to hear and determine it. The Federal Court therefore has no jurisdiction to entertain this appeal. Accordingly, the appeal is not competent. These, then, are the submissions of the respondent.

Responding to these submissions, Cik Perpetua Phang of counsel for the appellant argued that the appeal had been properly brought before this court and was, therefore, competent. Her argument is that the appellant, at the date of the decision by the High Court, had a substantive right vested in him to approach this court, and that the amendment to the Act did not operate to deprive her client of that right. In support of her argument, counsel relied upon *Lee Chow Meng v PP* [1978] 2 MLJ 36 and read to us the following passage from the judgment of Suffian LP at p 37:

> A statute dealing with *procedure* has retrospective effect, that is, it applies to proceedings begun before and after the commencement of the statute, unless a contrary intention is expressed or clearly implied. This was so stated by Lord Blackburn in *Gardner v Lucas* (1878) 3 App Cas 582 at p 603:
>
> > '... it is perfectly settled that if the legislature forms a new procedure, that, instead of proceeding in this form, you should proceed in another and a different way, clearly there bygone transactions are to be sued for and enforced according to the new form of procedure. Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be.'
>
> On the other hand, a statute dealing with rights has effect only for the future, and is not to be construed retrospectively, it does not apply to proceedings begun before its commencement, it only affects proceedings begun after that, unless there is a clear indication to the contrary. This was so stated by Jessel MR in *Re Joseph Suche & Co Ltd* (1875) 1 Ch D 48 at p 50 in the following words:
>
> > 'It is a general rule that when the legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them.'
>
> Does a statute allowing a convicted person to appeal to a superior court deal with procedure or with rights?

No authority need be cited for the proposition that no court has an inherent appellate jurisdiction and that a dissatisfied person may appeal if, and only if, statute so provides.

It is thus clear that a statute that allows a person to appeal to a superior court is not merely dealing with a matter of procedure but with rights. This is borne out by a Privy Council case *Colonial Sugar Refining Co v Irving* [1905] AC 369. There an application was made to the Judicial Committee to dismiss an appeal from the judgment of the Supreme Court of Queensland, on the ground that the power of the court below to give leave to appeal had been abrogated by s 39 of the Australian Commonwealth Judiciary Act 1903. The action in which the appeal was brought had commenced on 25 October 1902, and the leave to appeal was given on 4 September 1903. In the meantime, the 1903 Act had been passed. The Judicial Committee dismissed the application, Lord Macnaghten saying:

> 'As regards the general principles applicable to the case there was no controversy. On the one hand it was not disputed that if the matter in question be a matter of procedure only, the petition (to dismiss) is well founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the [Judiciary] Act, it was conceded that in accordance with a long line of authorities from the time of Lord Coke to the present day the appellant [the Sugar Co] would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendment. And therefore the only question is, was the appeal to his Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their lordships that the question does not admit of doubt. To deprive a suitor *in a pending action* of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure.'

Here at the time of the appellant's conviction he had no right of appeal from the appellate High Court to the Federal Court, so there is no question of the amendment to the Courts of Judicature Act interfering with his right of appeal then existing. The amendment confers a right of further appeal to the Federal Court on a person convicted by a Special President. This amendment deals not with a mere matter of procedure, but confers a substantive right. Prima facie it has prospective effect only unless there is a clear indication to the contrary. In our judgment, there is no such indication here. It follows therefore that a person convicted by a Special President before the amendment who has lost an appeal to the High Court has no right of further appeal to this court.

Since writing this judgment we came across *Chellapah v Malayan Railway Administration* [1948–49] MLJ Supp 173, where a person affected by any order or decision of the Registrar could appeal to a judge in chambers until 31 December 1948, and after 18 February 1949, but not during the period of about eight weeks between those two dates. The right of appeal until the earlier date was given by the Courts Enactment and a rule under it, and after the second date by the Courts Ordinance 1948 (replacing the Enactment), and a rule under it. It was held that a person affected by an order or decision of the Registrar on 15 February 1948 could appeal under the Ordinance, since the Ordinance itself came into force on 1 January 1949, and from the words used in the legislation it could be said that the hiatus was an oversight and not intentional. (Emphasis added.)

In *Colonial Sugar Refining Co Ltd v Irving* [1905] AC 369, there appears the following passage immediately after that quoted by the learned Lord President in his judgment at p 372:

> In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested.

The opinion of Lord Macnaghten in the *Colonial Sugar Refining Co* case ('the Macnaghten test') has been applied in a number of other Malaysian and Singaporean cases in the context of retrospectivity of criminal statutes. See, *Teo Cheng Leong v PP* [1970] 2 MLJ 275; *Phang Chin Hock v PP (No 2)* [1980] 1 MLJ 213; *PP v Hun Peng Khai & Ors* [1984] 2 MLJ 318.

It has been applied in Canada: see, for example, *Doran v Jewell* 49 SCR 88; *AG & Ors v Murray* (1968) 70 DLR (2d) 52; *Province of New Brunswick v Budovitch* 1 NBR (2d) 661.

The Macnaghten test has been read, as I think it should, as establishing the proposition that a right of appeal vests in a litigant at the time of institution of the original proceedings and not merely as a consequence of an adverse decision against the putative appellant. See, *Hoosein Kasam Dada (India) Ltd v State of Madhya Pradesh* AIR 1953 SC 221; *Garikapati v Subbiah Choudhry* AIR 1957 SC 540; *State of Bombay v Supreme General Films Exchange* AIR 1960 SC 980; *Kasibai v Mahadu* AIR 1965 SC 703; *Jose Da Costa v Bascora Narcornim* AIR 1975 SC 1843.

In other words, the point of time at which it is to be determined whether a right of appeal exists is, unless there are reasons to conclude to the contrary, the date on which the original action or other proceeding was instituted, and not the date on which the notice of appeal is filed and served. Any alteration in the law relating to appeals, whether it is an abolition of the right, or a transfer of the right to another tribunal (in the present case to the Court of Appeal) after institution of original proceedings, is presumed not to be retrospective.

The presumption against retrospectivity of legislation is based upon the judicial philosophy that Parliament does not intend an unjust result. See *Pesurohjaya Ibu Kota Kuala Lumpur v Public Trustee & Ors* [1971] 2 MLJ 30 at p 31. That this approach is still current appears from two recent decisions of the House of Lords. The first of these is *'The Boucraa'* [1994] 1 All ER 20 at pp 29–30 where Lord Mustill said:

> My Lords, it would be impossible now to doubt that the court is required to approach questions of statutory interpretation with a disposition, and in some cases a very strong disposition, to assume that a statute is not intended to have retrospective effect. Nor indeed would I wish to cast any doubt on the validity of this approach for it ensures that the courts are constantly on the alert for the kind of unfairness which is found in, for example, the characterisation as criminal of past conduct which was lawful when it took place, or in alterations to the antecedent natural, civil or familial status of

individuals. Nevertheless, I must own to reservations about the reliability of generalized presumptions and maxims when engaged in the task of finding out what Parliament intended by a particular form of words, for they too readily confine the court to a perspective which treats all statutes, and all situations to which they apply, as if they were the same. This is misleading, for the basis of the rule is no more than simple fairness, which ought to be the basis of every legal rule. True it is that to change the legal character of a person's acts or omissions after an event will very often be unfair; and since it is rightly taken for granted that Parliament will rarely wish to act in a way which seems unfair it is sensible to look very hard at a statute which appears to have this effect, to make sure that this is what Parliament really intended. This is, however, no more than common sense, the application of which may be impeded rather than helped by recourse to formulae which do not adapt themselves to individual circumstances, and which tend themselves to become the subject of minute analysis, whereas what ought to be analysed is the statute itself.

My Lords, my purpose in stressing this point is not to suggest that the courts below approached the question in a mechanistic way. Their careful judgments show that this was not the case. It is simply to explain why I do not find it necessary to cite and analyse the numerous authorities on retrospective effect, but prefer to proceed directly to the ascertainment of the intention which Parliament intended s 13A to achieve, by a reference to the following statement by Staughton LJ in *Secretary of State for Social Security v Tunnicliffe* [1991] 2 All ER 712 at p 724 (quoted by Sir Thomas Bingham MR in the present case ([1993] 3 All ER 686 at p 693, [1993] 3 WLR 266 at p 274):

> 'In my judgment the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree — the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended.'

Precisely how the single question of fairness will be answered in respect of a particular statute will depend on the interaction of several factors, each of them capable of varying from case to case. *Thus, the degree to which the statute has retrospective effect is not a constant. Nor is the value of the rights which the statute affects, or the extent to which that value is diminished or extinguished by the retrospective effect of the statute.* Again, the unfairness of adversely affecting the rights, and hence the degree of unlikelihood that this is what Parliament intended, will vary from case to case. So also will the clarity of the language used by Parliament, and the light shed on it by consideration of the circumstances in which the legislation was enacted. *All these factors must be weighed together to provide a direct answer to the question whether the consequences of reading the statute with the suggested degree of retrospectivity is so unfair that the words used by Parliament cannot have been intended to mean what they might appear to say.*

My Lords, whilst the approach which I propose involves a single indivisible question, to be answered largely as a matter of impression, it is convenient for the moment to look separately at the various factors. (Emphasis added.)

The second is *Plewa v Chief Adjudication Officer* [1994] 3 All ER 323 at p 329; [1993] 3 WLR 317 at p 323 where Lord Woolf approved the statement of the principle by Staughton LJ in *Secretary of State for Social Security v Tunnicliffe* [1991] 2 All ER 712 at p 724 which had also received approval in the speech of Lord Mustill in '*The Boucraa*'.

Thus, in any given case, the task to be undertaken by a court is to examine the particular statute that has fallen for interpretation and to ascertain what Parliament intended. In the context of the present case, the question that falls for determination is whether the prima facie presumption against retrospectivity has been displaced by contrary Parliamentary intention, and if so, to what extent.

Before I proceed to examine the statute and the amendments thereto, it is, I think, not inappropriate to remind myself on the nature of appeals generally. Upon this point it is sufficient to quote two authorities. The first is the joint judgment of Isaacs and Rich JJ in *Commonwealth v Limerick Steamship Co Ltd* (1924) 35 CLR 69 at p 92:

> The result of these judicial pronouncements is this: that *an appeal is the continuous process of passing from one tribunal to another to correct the error of the first.* At one end of the process is the civil right of the suitor to make the appeal, and there is a corresponding obligation of the opposing litigant to abide by the result, and further there is by necessary connotation the duty of the first tribunal to conform to the opinion of the second tribunal. All that depends on the appropriate law of the locality of the first tribunal. At the other end of the process stands the appellate tribunal, dependent, for its powers and authority to entertain and pronounce upon the appeal, upon the appropriate law of its own locality. The respective appropriate laws may emanate from the same authority and from different authorities. But it is clear from Lord Westbury's words [spoken in *A-G v Sillem* (1864) 10 HLC 704] that a right of appeal from any court is a limitation of that court's jurisdiction. It lessens or may destroy the obligatory force of its orders; it delays or prevents execution of its decrees. It necessarily follows that the jurisdiction of a court to decide and enforce finally and free from appeal is a larger jurisdiction than the jurisdiction to decide and enforce subject to an appeal. It is also clear — and the above-cited case of *EW Gillett & Co v Lumsden* (1905) AC 601 is one illustration — that the local law at the initial end of the appeal process may so control *the civil rights of the litigants* that, though there is a tribunal at the other end equipped with full authority to discharge appellate functions, the continuity of appellate jurisdiction fails.

The second is *Jironc v Quodling* (1978) 20 ALR 103 at p 105 in which there appears the following passage in the joint judgment of Nimmo and St John JJ:

> Immediately before the commencing day the appellant had a right to appeal to the High Court from the judgment of Connor J by virtue of the provisions of s 51 of the Australian Capital Territory Supreme Court Act 1933 and unless the filing of the notice of appeal in the High Court had the effect of exhausting or extinguishing that right it is, by force of s 24 of the Federal Court Act, converted into a corresponding right to appeal to this court. *The right of appeal must include the whole process whereby a judgment of an inferior court is considered by an appellate court and a decision reached by that appellate court.* (Emphasis added.)

A I now turn to consider the legislation upon which the respondent's submission rests.

It is not in doubt that before the passing of the Courts of Judicature (Amendment) Act 1994 ('the Amending Act of 1994'), a party to civil proceedings who was dissatisfied with the decision of a High Court given
B in its original or appellate jurisdiction could, subject to certain qualifications that are not material to the present case, appeal to the Supreme Court of Malaysia. Section 16 of the Amending Act of 1994 wrought a substantial change to the judicature by resorting to the rather simple method of deletion and substitution. In Pt III of the Act, which until the amendment had governed the appellate jurisdiction and powers of the Supreme Court,
C all references to the Supreme Court were deleted and replaced with references to the Court of Appeal. The Amending Act of 1994 does not, however, contain any provision in respect of suits pending before the High Courts as at the date of the amendment. There is, therefore, no express provision in the Amending Act of 1994 displacing the Macnaghten test.
D Whether it has been displaced by necessary implication is a matter I shall touch upon later.

In the light of the foregoing, if the Macnaghten test is applied to the present case, in the absence of a contrary intention — and as I have said I find no contrary intention expressly stated in the Amending Act of 1994
E — it would mean in that in respect of *all* suits and other proceedings which had been instituted in a High Court *before* 24 June 1994, appeals would lie directly to this court and *not* to the Court of Appeal. The result would be that all orders made upon applications and appeals in respect of matters heard and disposed of by the Court of Appeal since its establishment were made without jurisdiction, and are therefore nullities. If that is the true
F consequence intended by Parliament, then I must, despite the horrendous consequences that would follow, adhere to its will and hold accordingly.

Now, there is a presumption of great antiquity which operates in the sphere of statutory interpretation. It is an irrebuttable presumption. It is that Parliament is presumed to know all the relevant law upon the particular
G subject upon which it legislates. In the context of the present dispute, Parliament is presumed to have known the nature and content of the Macnaghten test.

While there may be no express saving provision in the Amending Act of 1994, I find that there is room for implying a contrary intention out of
H necessity. I am convinced that the hiatus in the Amending Act of 1994 was an oversight and unintentional, just as it was in *Chellapah v Malayan Railway Administration* [1948–49] MLJ Supp 173.

Now, there are, without a doubt, several pronouncements by eminent judges in this country and in other common law jurisdictions to the effect
I that the intention of Parliament is to be gathered solely from the words used in a statute. That is, as I apprehend the law, one of the guidelines for statutory construction. There are several other such guidelines, some of them expressed in the form of presumptive statements. But they are, as I have said, merely guidelines, and the meaning and effect to be given to a

statute or to one or more of its provisions must depend upon the terms of the particular enactment and its objective aim. In ascertaining that aim, it is the duty of the court, to have regard to the consequences that would ensue from holding a statute to be retrospective or prospective and to avoid any construction that would produce absurd results.

I think that it is a perfectly proper approach for a judicial interpreter to take by asking himself, as I have done in this case, whether the legislature could have contemplated so a strange a result as that adverted to. Indeed that is the very question that Lord Mustill asked himself in '*The Boucraa*' [1994] 1 All ER 20 at pp 28–29. He answered that question in the negative. Upon the terms of the statute before me, I would do likewise.

In my judgment, the correct approach is to look at the substance and general purpose of the legislation in order to discover its objective aim or purpose. And when I do that, I am much moved to the conclusion that Parliament could not have intended those horrendous consequences of which I spoke a moment ago. To hold otherwise would mean that Parliament went through the elaborate process of creating the Court of Appeal and endowing it with all the appellate powers and jurisdiction theretofore enjoyed by the Supreme Court, only to leave it bereft of any business. It would mean that Parliament was legislating in vain. With respect, I do not think that it is open for me to reach such a conclusion.

I may mention in passing, that in the course of considering the preliminary objection, I called for and read the explanatory statement to the Bill which was presented in Parliament, and which was passed as the Amending Act of 1994. In doing so, I proceeded by analogy, acting upon the landmark decision of this court in *Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345 at p 360, where a dynamic extension of the relevant interpretative principles was effected by the judgment of Edgar Joseph Jr FCJ. However, I have derived no real assistance from the explanatory statement to the Bill and its contents have in no way influenced my decision upon this matter.

When viewed from the standpoint that I have adopted, it is clear that Parliament intended to displace the Macnaghten test to this extent; that the cut-off date with regard to the appellate jurisdiction of this court in respect of cases decided by a High Court is the date of the decision and not the date of the institution of the proceedings. In arriving at my conclusions upon this matter, I have not overlooked the provisions of s 17 of the Courts of Judicature (Amendment) Act 1995 ('the 1995 Act'). But I have reached my decision despite the terms of that section which reads as follows:

> Any proceeding which is pending before the Supreme Court on the 23rd June 1994 shall be continued or proceeded with, as the case may be, before the Federal Court and for this purpose the Federal Court shall have and exercise all the powers of the Supreme Court prior to the 24th June 1994.

Section 1 of the 1995 Act declares that the amendments made by it 'shall be deemed to have come into force on the 24th June 1994'. But the 1995 Act received royal assent on 7 February 1995, and was published in the

A *Gazette* on 16 February 1995. Thus, it is a legislative enactment having true retrospective effect.

Neither side drew the attention of this court to the provisions of the 1995 Act, either during oral argument or in the written submissions which were later delivered pursuant to directions given at the conclusion of the B hearing. But their omission to do so does not relieve me of my duty to consider the effect of s 17.

At first blush, the section appears to postulate the existence of a proceeding 'pending before the Supreme Court on the 23rd June 1994' which 'shall be continued or proceeded with ... before the Federal Court'. C On such a construction, it would follow that if there was no proceeding *pending* before the Supreme Court on 23 June 1994, then there would be nothing to be proceeded with before this court. One way, therefore, to construe the section is to declare that it only applies to cases where a notice of appeal has already been lodged in the Supreme Court on or before 23 June 1994, notwithstanding that the period fixed for the lodgment of a D notice of appeal has not expired.

Relating it to the facts of the present case, the effect of the suggested construction may be stated as follows:

(1) the decision of the High Court was delivered on 7 June 1994. Under E the relevant law as it stood as at the date of the delivery of the decision, the appellant had until 7 July 1994 to file and serve his notice of appeal. (See, *Setali Development Sdn Bhd & Anor v Lim You Keng* [1984] 1 MLJ 26.) His right of appeal was one of substance and not of mere procedure; and

F (2) he delivered his notice of appeal on 24 June 1994, that is to say, well within the time prescribed by law. In terms of the 1995 Act that was passed approximately eight months later, there was, with regard to the appellant, no pending proceeding before the Supreme Court and therefore nothing to be continued before this court. It would follow that this court has no jurisdiction to hear and determine this appeal.

G In the view I take of the law governing the interpretation of statutes, the question I must ask myself in a case such as this is whether Parliament intended this result. Having given this matter my most anxious consideration, I am unable to honestly say that it did. I, therefore, unhesitatingly reject the interpretation of s 17 of the 1995 Act which H would have the effect of barring this appeal.

Were I to subscribe to the suggested interpretation, it would lead to an unjust result. Take this very case. The present appellant, when he filed his notice of appeal, having no advantage of clairvoyance, could not have foreseen that Parliament would, in February 1995, pass legislation that I would, when read literally, deprive him of his right of appeal. To read s 17 as retrospectively depriving the appellant of a substantive right would result in a manifest injustice. In my judgment, the injustice that would be occasioned by adopting the suggested interpretation is, in itself, a sufficient reason for me to reject it.

Further, one must not lose sight of the historical background which required s 17 of the 1995 Act to be placed on the statute books. When the 1995 Act was passed and came into effect, as I have said, on 24 June 1994, there were several hundred appeals awaiting disposal before the Supreme Court. The Amending Act of 1994, while renaming the Supreme Court as the Federal Court, did not confer any jurisdiction upon the latter tribunal to continue to hear and dispose of pending matters. Yet this court proceeded to do so. There then arose a general apprehension as to whether this court could do this. It is to meet this limited exigency that Parliament enacted s 17 of the 1995 Act. It formed part of a legislative process whereby certain other anomalies that were created by the Amending Act of 1994 were clarified, eg the appealability to the Federal Court from final judgments of the Court of Appeal in appeals concerning prerogative orders. (See, s 16 of the 1995 Act). The 1995 Act also abolished trial by jury in certain criminal cases.

Apart from relying upon the history behind the particular legislation, I also draw support for my conclusion from the sidenote, or as it is more frequently called, the marginal note to s 17. It says: 'saving and transitional'. That is precisely what I think the section is designed to do: to make savings for the appeals awaiting disposal before the Supreme Court on the day before the date on which the the Federal Court was created as the third tier in the hirearchy of superior courts. It does nothing whatsoever to affect the question which has arisen for determination in the instant case.

I have, as indicated earlier, relied upon an extraneous source and an internal aid to reach the conclusion I have expressed upon the effect of s 17. Lest it be thought that in doing so I have emblazoned a trail upon which all but angels in fear may tread, I hasten to add that I have relied upon sound and respectable authority to guide me through the course I have chartered for myself. Of these, I need only mention two; one for each approach.

In resorting to the historical background to the section, I have been persuaded by what Lord Griffith said in *Pepper (Inspector of Taxes) v Hart* [1993] AC 593; [1993] 1 All ER 42; [1992] 3 WLR 1032, a case upon which much reliance was placed by my learned brother Edgar Joseph Jr FCJ in the *Farlim* case to which I referred earlier in this judgment. The passage in the speech of Lord Griffith appears in [1993] AC 593 at p 617; [1993] 1 All ER 42 at p 50; [1992] 3 WLR 1032 at p 1040, of the report and in it he says this:

> The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears on the background against which the legislation was enacted.

I must confess that I have done likewise when arriving at my decision upon the point taken in the present appeal.

In respect of sidenotes, I would refer to what Upjohn LJ said in *Stephens v Cuckfield Rural District Council* [1960] 2 QB 373 at p 383:

> While the marginal note to a section cannot control the language used in the section, it is at least permissible to approach a consideration of [the section's] general purpose and the mischief at which it is aimed with the note in mind.

The approach that commended itself to Upjohn LJ on that occasion is the one that I have used in the fulfillment of my task in the present case.

It follows from what I have thus far said, that in respect of all causes and matters pending before a High Court, appeals against decisions pronounced *before* 24 June 1994, lie to this court which has jurisdiction to entertain them. However, in respect of all decisions pronounced *on or after* that date, appeals lie to the Court of Appeal which is seized with jurisdiction to entertain them.

In the present appeal, the decision by the High Court was delivered before the Amending Act of 1994 came into force. It is a case to which the Amending Act of 1994 has no application. The provisions of s 17 of the 1995 Act do not, for the reasons already given, render this appeal incompetent. The appeal was, therefore, properly brought to this court and we have jurisdiction to deal with it to the exclusion of the Court of Appeal.

I have, since preparing this judgment, had the advantage of reading the draft judgment of my learned brother Edgar Joseph Jr FCJ. We have come to the same conclusion, but along somewhat different routes. My learned brother has taken the view that the Amending Act of 1994 has not the effect that I have said it has. Nor do my reasons as to why the legislature found it necessary to enact s 17 of the 1995 Act coincide with those expressed by my learned brother. It is entirely my misfortune, where our approaches differ, to find myself in disagreement with him. And it is only by reason of my own inadequacies that I am left unpersuaded by his erudite judgment that this appeal ought to be disposed of solely by reference to the effect that we ought to give to s 17 of the 1995 Act.

For the reasons that appear in this judgment I hold this appeal to be competent. The preliminary objection is accordingly overruled with costs. The Registrar of this court shall proceed to fix a date for the hearing and disposal of this appeal.

Mohamed Dzaiddin FCJ: I have had the advantage of reading the draft judgment of the court of my brother, Edgar Joseph Jr FCJ and the judgment of my brother, Gopal Sri Ram JCA, and agree with their conclusions that the preliminary objection be overruled with costs for reasons stated in the judgment of the court.

Preliminary objection dismissed.

Reported by Sally Kee Seok Meng